

IN THE UNITED STATES DISTRICT COURT
FOR THE District
OF Delaware

UNITED STATES OF AMERICA

V.

Audrey Miller

Petitioner

Civil A.No. 01-440-KAJ

Crim. No. ~~95-13~~-MMS

Judge: ~~Kent A. Jordan~~

FILED

JAN 13 2006

U.S. DISTRICT COURT
DISTRICT OF DELAWARE

MOTION TO CORRECT ILLEGAL SENTENCE PURSUANT TO 18 U.S.C. §3742(a)
(1)(2) Rule 52(b) 28 U.S.C. §2244 (a)(2)(A)

COME NOW, Audrey V. Miller, Petitioner, pro se,
to this Honorable Court seeking the correction of her sentence,
pursuant to 18 U.S.C. §3742(a)(1)(2). She asks this Court to
give retroactive application of the ruling in the recent Supreme
Court opinion *Blakely vs Washington* 542 U.S. (2004), and *Booker*
vs United States 125 S CT 733 (2005).

Pursuant 3742, Jurisdiction is established and a defendant
may file a notice of appeal in the District Court of an otherwise
final sentence which was imposed in violation of law.

The Standard of review is the Federal Rule of Criminal
Procedure Rule 52(b) for Plain Error. Plain Error is an error
that effects substantial rights of defendant and should be
reviewed de novo. See *State vs Hughes* 154 Wash 2d 118, 110
p 3d 192 (2005), and *Washington Supreme Court vs Arturo P.*
Recuenno, granted Certiorai on 10/17/2005.

This motion serves also as a notice of appeal pursuant

to 18 U.S.C. § 3742(a)(1)(2) to the Illegal Sentence I received
on July 25, 1995, for Violation of 21 U.S.C.
§ 841(a)(1)

in which I recieved 300 months Sentence.

Petitioner respectfully directs this Court's attention
to the Memorandum in support of the instant motion and for the
reasons set forth therein, the Petitioner respectfully requests
that the Court grant her motion and vacate, reverse and or remand
her sentence accordingly.

Respectfully Submitted this day January
10, 2006

Andrey Miller
Petitioner, pro se

MEMORANDUM IN SUPPORT FOR

FOR Crim. A. No. 95-13-MMS CASE NUMBER _____

COME NOW, Audrey Miller, Petitioner, pro se, and respectfully submits this Memorandum in support of the motion to correct her illegal sentence imposed using sentencing factors and conduct considered relevant conduct in violation of her 6th Amendment Right in the Constitution and her Due Process Rights of the Judicial System. Petitioner presents this Memorandum in support of her motion to correct an illegal sentence based on the recent Supreme Court opinion in Blakely vs Washington 542 U.S. (2004), and Booker vs United States 125 S Ct 738 (2005), State vs Hughes 154 Wash 2d 118, 110p and Washington vs Arturo P. Recuenco no. 05-83, and Petitioner reserves the right to amend or supplement at any time deemed appropriate. My indictment charged me with violating criminal codes Possession with intent to distribute "crack cocaine" in violation of 21 U.S.C. §841(a)(1).

_____. I received 300 month sentence based upon a Judge at sentencing using relevant conduct factors to base my sentencing Guideline Range. This conduct was not charged in my charging document, this conduct was not agreed to, or admitted in a plea. The conduct was considered UNCONSTITUTIONAL to give me a guideline range higher than it would have been absent it's use in sentencing. To use this conduct considered relevant conduct, to give me a higher Base Offense level or a guideline sentence based on these factors the court attached an additional 187.1 grams of crack cocaine to the admitted 18.9 grams by the defendant.

conduct not brought before the jury or admitted to.) Is Unconstitutional, in violation of my 6th Amendment Rights according to the opinion of the recent Supreme Court rulings in Blakely vs Washington 542 U.S. (2004), Booker vs United States 125 S ct 738 (2005).

Considering the new opinions the Court would have to review the entire process used to establish my sentencing Guidelines used as a Base in determining my sentence. Using this new range the Court would have to determine absent the use of the illegal sentencing factors what would my sentence be or would I have had a sentence.

Citing Blakely/Booker held that "because the facts supporting Petitioner's exceptional sentence were neither admitted by Petitioner nor found by jury. The sentence violated his 6th Amendment right to trial by jury". Blakely referenced APPRENDI in which states that the maximum sentence a judge may impose is a sentence based solely on the facts reflected in the jury verdict or admitted by defendant. In other word's the relevant Statutory Maximum is not the Maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. Booker ruled the Guidelines advisory under section 18 U.S.C. §3553(a).

My argument is that I received a 300 month sentence based on sentencing factors that are unconstitutional according to the Supreme Court rulings and Court opinions in APPRENDI/BLAKELY and BOOKER. Therefore my sentence should be lowered to reflect the proper sentence absent these factors.

The parts of the Court records relevant to my claims are:

Trial by Judge transcript, Plea agreement, sentencing transcripts,

Presentence report and Judgement and commitment.

_____. Retroactive application of Blakely vs Washington, In the Blakely opinion page 11 O'Connor dissenting "all Criminal sentences imposed under the Federal and State Guidelines since APPRENDI was decided in 2000 arguably remain open to Collateral attack. See Teague vs Lane 489.

Citing: Teague vs Lane (1989) 489 U.S. 288, 103 L ED 2d 334 109 S ct. 1060 at 341 29(a) "Retroactivity is properly treated as a threshold question for a new constitutional rule of Criminal procedure and applied to the defendant in the case announcing the rule. Even hand Justice requires that it be applied Retroactively to all who are similarly situated. (b) Justice Harlan's view that new constitutional rules of Criminal Procedure generally should not be applied retroactively to cases on Collateral review is the appropriate approach. (Unless) they fall within one of Justice Harlan's suggested exceptions to this general rule that a new rule should be applied retroactively (1) if it places "certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe. Mackey vs United States U.S. 401 U.S.667 692, 281 Ed 2d 404 91 S ct 1160 or (2) if it requires the observance of those Procedures that....are "implicating the concept of ordered liberty". (The second exception should be limited in scope to those new procedures without which the likelihood of an accurate conviction is seriously diminished). Pursuant the ruling in Tyler vs Cain (2001) 533 U.S. 632 150

L Ed 2d at 645 121 S Ct 247 at 533 at 645. Justice Bryer observes that this Court can make a case retroactive over the course of two cases).

The Supreme Court holding in APPENDI vs NEW JERSEY, BLAKELY vs WASHINGTON, BOOKER vs UNITED STATES requires proof of factors, that enhance a sentence or sentencing range.

Petitioner asserts that the Supreme Court's holdings in APPENDI vs NEW JERSEY (120 S ct 2348 147 L Ed 2d 435 2000), BLAKELY vs WASHINGTON (542 U.S....2004), BOOKER vs UNITES STATES (125 S ct 738 2005), support the ruling rendering unconstitutional the relevant conduct attributed to her based on the United States Probation Officer. As an extension of the opinion in the Supreme Court cases, any enhancement in punishment by means of relevant conduct must be admitted to, charged and put before a jury and proven beyond a reasonable doubt. Petitioner maintains the relevant conduct which held her accountable for was the 187.1 grams that defendant is still
objecting.

was not admitted, proven beyond a reasonable doubt not charged
or agreed to in a plea, and was based on facts not before the
jury. It is unconstitutional to attribute the conduct to her.
The above cases of the Supreme Court hold the opinion that a judge alone cannot constitutionally use relevant conduct as sentencing factors that would enhance a defendant's sentence.

Therefore Petitioner objects to the following that was attributed to her at sentencing by the District Court Judge

The 187.1 grams and also the Career Offender statute

Based upon the above argument regarding APPRENDI, BLAKELY and BOOKER all sentences imposed using factors of relevant conduct related to dismissed, acquitted or uncharged conduct that was not agreed to or put before the jury is unconstitutional and are essentially enhanced. (Black's Law Dictionary defines, "enhanced" as this "This word taken in a unqualified sense is synonymous with Increased and comprehends any increase of value. However, caused or arising. Thus the sentencing Guidelines Base Offense levels absent the unconstitutional factors considered to establish it could be substantially lower making the sentence received exceptional

It was Plain Error See State vs Hughes 154 Wash 2d 118 110p 3d 192 (2005) Arturo P. Recuenco vs Washington Supreme Court. Certiorari granted 10-17-2005, no 05-83. It was Plain Error for the District Court to use relevant conduct from the Probation Officer's report, which was not put before a jury and found or proven beyond a reasonable doubt neither by a preponderance of the evidence standard. Pursuant to Rule 52(b) Plain Error is an error that affects substantial rights of a defendant, the District Court Judge at sentencing used factor's that were uncharged and never proven to a jury nor pleaded to. The District Court committed reversible error by using "facts extracted after trial from a report compiled by a probation officer, who the Judge thinks more than likely got it right, than got it wrong", citing Blakely opinion 542 U.S. (2004) P16.

The problem with this assertion is all of the elements

in the Probation Officer's report are presented after a guilty plea or after trial, and is essentially the Government's version of what happened, and include uncharged relevant conduct factors and enhancement factors presented to the sentencing Court and is almost always accepted as fact by the sentencing Judge and used to enhance sentences unconstitutionally in spite of defendant objects to those facts in the report which are not proven true by the jury not charged or dismissed before the sentencing phase. Any factors not presented on the indictment but presented at sentencing as a sentencing factor triggers a different outcome absent the factors is essentially an enhancement factors used by a judge to determine the ultimate sentence. The Supreme Court in APPENDI, BLAKELY, and BOOKER establishes clear and convincing standards of law on sentencing factors and relevant conduct in respect to how these factors are implemented in a way that respects the 6th Amendment I object to Chapter four enhancements: were U.S.S.G. §4A1.2(o), U.S.S.G. §4B1.2(1)(i), and U.S.S.G. §4B1.1 which altogether gave me an 6 point enhancement.

My sentence should be with drug quantity 120-150 months, with
absent these objections. Career Offender 188-235 months.

The Guidelines are now advisory and this Court has the discretion to correct Petitioner's sentence 3553(a). Wherefore, Petitioner prays that her memorandum that supports her objections to the unconstitutional sentence she recieved based upon Relevant Conduct Sentencing factors in the Presentencing Report (Probation Officers) sufficiently supports her request for vacating her sentence.

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As a remedy to correct the unconstitutional errors in the sentence she recieved. The Due Process Clause of the United States Constitution and that her sentence be adjusted downward accordingly.

Respectfully Submitted 10th day of January
2006

Candacy Miller
Petitioner, pro se

CERTIFICATE OF SERVICE

I, Audrey Miller, certify under the penalty of perjury pursuant to 28 U.S.C. 1746, that a true and correct copy of the foregoing has been placed in the Federal Correctional Institution mailbox in Danbury, Connecticut on this 10th day of January, 2006 in accordance with the prison mailbox rule Houston v. Lack, 487 U.S. 266 (1988), this above styled motion is deemed filed upon placement in the prison mail room and mailed to the following:

Thomas V. McDonough ESQ.

Asst. U.S. Attorney

844 King Street

Wilmington, De. 19801

So Served,

Audrey Miller

AUDREY MILLER03660-015
FEDERAL CORRECTIONAL INSTITUTION
ROUTE 33, Pembroke Station
Danbury, CT 06811



Legal Mail

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